

## COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

1570 Grant Street, Denver, CO 80203-1818 • (303) 866-2993 • (303) 866-4411 Fax John W. Hickenlooper, Governor • Susan E. Birch MBA, BSN, RN, Executive Director

August 29, 2011

Barbara Edwards, Director
Disabled & Elderly Health Programs Group
Center for Medicaid, CHIP and Survey & Certification
Centers for Medicare & Medicaid Services
Department of Health and Human Services,
Attention: CMS-2348-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: CMS-2348-P Medicaid Program; Face-to-Face Requirements for Home Health Services; Policy Changes and Clarifications Related to Home Health

Dear Ms. Edwards:

I am writing to you on behalf of Colorado's single state Medicaid agency, the Department of Health Care Policy and Financing to provide comment related to CMS-2348 P Medicaid Program; Face-to-Face Requirements for Home Health Services; Policy Changes and Clarifications Related to Home Health proposed regulations under Section 6407 of the Affordable Care Act.

Colorado shares the federal interests in ensuring the clinical appropriateness and integrity of the Medicaid Program and recognizes the value associated with ensuring that the prescriber of services has had a recent clinical interaction with the client. However, Colorado wishes to ask for clarification on some provisions and to raise concerns about other provisions.

While Colorado has specific comments concerning provisions of the proposed regulations, we also have some overarching questions. The first is whether CMS has contemplated a phase-in of the face-to-face encounter requirement for existing home health clients. Many Medicaid clients with long-term home health needs have an annual prior authorization for those services in conformance with an approved State Plan Amendment. Colorado strongly recommends that CMS allow States to phase in the face-to-face requirement for existing clients over the two (2) physician certification periods following the effective date of the final rule. Doing so would provide existing clients a total of 120 days (30 additional days beyond the proposed requirements) to continue much needed home health services while appointments and transportation arrangements are being made for the needed face-to-face encounter.

Colorado also asks for CMS clarification on the applicability of the face-to-face encounter requirements for health-related attendant services under a self-directed option. Colorado notes that the Community First Choice Option proposed regulations at §441.505 define health-related tasks to mean "...tasks ... which can be

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delegated or assigned by licensed health-care professionals." That definition implies that many such health-related tasks would, in the absence of a self-directed model, likely be provided as home health services subject to the face-to-face encounter requirements of these proposed regulations. Creating a regulatory framework where the same tasks provided to individual clients with similar needs are subject to considerably different, and arguably more stringent, criteria for review for FFP allowability is problematic. Colorado perceives this approach creates vulnerability to allegations of discrimination since the applicability appears to be based merely on a client's selection of delivery model for receipt of services.

Page 41034 of the *Federal Register* notice published July 12, 2011 posed the question about whether CMS should continue its policy of using guidance that is not reflected in regulation to allow States to list DME equipment, exclusions or presumptions so long as there is opportunity for a client to request an exception or rebut the presumption. Based on Colorado's experience with implementing this policy guidance, we recommend that CMS formalize the requirements in regulation.

In addition, Colorado has the following specific comments:

**§440.70(b)(3)** Suitable for use in non-institutional settings. Please clarify or define "normal life activities." Colorado notes that absent a definition there will likely be considerable confusion between this term and "activities of daily living" (ADLs), which is a familiar concept in home-based care. Colorado strongly suggests if it is not CMS' intent to refer to ADLs, a definition would clarify that intent. Also, please clarify whether the existing 16-bed or fewer size standard for determining whether a residential setting is an institution will be considered in determining whether supplies are suitable for use in "non-institutional settings." Also, please clarify the applicability for durable medical equipment that would be used in a school setting, which the Colorado Medicaid program has traditionally expected the school district to cover.

§440.70 (c) Receiving services in non-institutional settings. Please clarify whether a State may, through a State Plan Amendment, set a reasonable limit on the number of non-institutional settings that may be the site for receipt of home health services on an individual per-client basis, in addition to the client's residence. Please also clarify whether <u>all</u> normal life activities must be able to take place in the non-institutional settings or whether there is recognition that only some normal life activities may be appropriate for the setting. Colorado strongly recommends that States be permitted to set reasonable limits on where certain services related to normal life activities may be performed. For example, States should be allowed to specify that skilled tasks associated with bathing be limited to the client's place of residence.

§440.70 (f)(2) Face-to-face encounter practitioners. Please clarify whether a State may, through a State Plan Amendment, choose to limit performance of the face-to-face encounter to a subset of the allowed non-physician practitioners.

§440.70 (f)(5) Face-to-face encounter through telehealth. Please clarify whether a State may, through a State Plan Amendment, limit the use of telehealth for conducting the face-to-face encounters to rural or other geographic areas where there are issues related to transportation or access to practitioners. Also, please clarify that such telehealth encounters would qualify for FFP as a reimbursable visit.

§440.70 (g) Medical equipment, supplies, or appliances. Please clarify whether a State may, through a State Plan Amendment, choose to limit performance of the face-to-face encounter to a subset of the allowed non-physician practitioners. Please also clarify whether a State may choose to extend the face-to-face requirements to include equipment, supplies, or appliances that are covered under the State's Medicaid Program, but are not Medicare benefits. Finally, Colorado strongly recommends that there be an explicit prohibition on any

ownership relationship between the physician ordering the equipment/supplies/appliances and the provider of those items.

Thank you for the opportunity to provide comment on concerns and suggested changes to the proposed rules on policy changes and clarifications related to Medicaid home health services and durable medical equipment. Should you have any questions, I can be reached at <a href="mailto:Barbara.prehmus@state.co.us">Barbara.prehmus@state.co.us</a> or via telephone at (303) 866-2991.

Sincerely,

Barbara B. Prehmus, M.P.H. Federal Policy & Rules Officer

Cc: Ms. Susan E. Birch, MBA, BSN, RN, Executive Director

Ms. Lorez Meinhold, Deputy Policy Director, Governor's Office of Policy and Initiatives,

Colorado Governor John W. Hickenlooper

Ms. Cynthia Mann, Center for Medicaid, CHIP, Survey & Certification

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